No. 82-1565

In The
Supreme Court of the United States
October Term, 1983

BACCHUS IMPORTS, LTD., and
EAGLE DISTRIBUTORS, INC.,
Appellants,

vs.

GEORGE FREITAS,
DIRECTOR OF TAXATION
OF THE STATE OF HAWAII,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

MOTION TO DISMISS OR REMAND

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The Appellee requests this Court to either dismiss or remand this matter for the following reasons:

1. Appellants have not borne the economic burden of the Hawaii Liquor Tax and therefore are not entitled to refund of the liquor taxes paid or other relief from this Court. Appellants have added on the amount of liquor tax to the normal wholesale selling prices of their liquors (J.A., at 9, 15 and 22). Pursuant to Hawaii Rev. Stat. § 244-5, Appellants have stated the amount of the liquor tax as a separate part of the wholesale selling price charged to liquor retailers. By separately stating the amount of liquor tax, the liquor retailer becomes respon-

sible for promptly remitting to the Appellant wholesalers the entire amount of the liquor tax or face severe penalties, including suspension of his retail liquor license. H. R. S. § 281-83. It cannot be clearer from the facts and from Hawaii's liquor tax structure that Appellants have passed on the entire amount of the liquor tax and have not borne any part of the economic burden of the tax.

2. In pertinent part, Hawaii Rev. Stat. § 244-5 provides as follows:

> "§ 244-5 Statement of tax as separate part of price. A dealer may state the amount of the tax accruing on a sale as a separate part of the price charged by him, but shall not be required to do so; however, section 281-83 shall not apply unless the amount of the tax has been so separately stated."

3. In pertinent part, Hawaii Rev. Stat. § 281-83 provides as follows:

> "§ 281-83 Payment of liquor tax to be made. Whenever liquor is purchased by the holder of a retail, dispenser, club, cabaret, hotel, or vessel license from the holder of a manufacturer's or wholesale license, the amount added to the price on account of the tax imposed by chapter 244, as provided by section 244-5, shall be paid by the purchaser within twenty days after the end of the month in which the purchase has been made. On the failure to make the payment within such time the liquor commission may in its discretion suspend the license of the purchaser for a period of not more than ten days for the first failure and not more than twenty days for any subsequent failure."

4. When a taxpayer claiming a refund has not borne the economic burden of the tax, the general rule is that the taxpayer is not entitled to a refund on the grounds of

unjust enrichment.[1] The principal exception to this rule appears where the taxpayer refunds or is under contract to refund the tax to the purchasers or consumers who ultimately paid the tax, in which case there is no unjust enrichment. 119 ALR 542 (1939) *anno:* "Right as between dealer and taxing authorities in respect of taxes illegally collected." In this case, where Appellants have not refunded the tax and have no contract or agreement to refund the tax to the consumers, Appellants have no right to receive a windfall of over 100 million in tax collections paid by other persons.

5. Because Appellants have no right to receive a tax refund even if the tax is held invalid, Appellants have no standing to litigate the validity of the tax.[2] While this issue was not raised below, it is jurisdictional and therefore must be addressed by this Court before reaching the merits of this case.[3]

6. The exemptions from the liquor tax which Appellants claim give them a right to the refunds in question

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[1]84 C.J.S., Taxation, § 632, "A taxpayer who has been otherwise compensated for the taxes paid is not entitled to a refund thereof." Cf. *Washington Plaza Associates v. State Board of Assessment Appeals*, 620 P. 2d 53 (1980); *State ex rel. Szabo Food Services, Inc. v. Dickinson*, 286 So. 2d 529 (Fla. 1973); *F. W. Monroe Cigar Co. v. Department of Revenue*, 50 Ill. App. 3d 161 (1977); *Consolidated Distilled Products, Inc., v. Mahin*, 56 Ill. 2d 110, 306 N. E. 2d 465 (1974), *appeal dismissed*, 419 U. S. 809 (1974); *State v. Obexer & Son, Inc.*, 660 P. 2d 981 (Nev. 1983).

[2]*Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U. S. 464 (1982); quoting *Frothingham v. Mellon*, 362 U. S. 447, 488; *North Carolina v. Rice*, 404 U. S. 244 (1971); *Simons v. Eastern Kentucky Welfare Rights Organization*, 426 U. S. 26, 37-38 (1976); *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227 (1937).

[3]*Clark v. Gray, Inc.*, 306 U. S. 583 (1939); *Tyler v. Judges of the Court of Registration*, 179 U. S. 405 (1900).

expired on June 30, 1981. Other than their claims for refund, there exists no controversy between the Appellants and the Appellee.

7. Assuming arguendo that the exemptions contained in the liquor excise tax were held to be invalid by this Court, these exemptions should be held severable from the remainder of the Hawaii Liquor Tax Law. The Hawaii legislature did not intend to jeopardize State revenues and relieve the liquor traffic in Hawaii from the Liquor Tax Law based upon its limited concern to promote insignificant aspects of the Hawaii liquor industry.[4] This issue should be resolved by this Court or remanded to the Hawaii Supreme Court for resolution.

8. In the disposition of this case, the Court below did not reach any Twenty-first Amendment issue because it found that the exemptions in question had no significant impact on either foreign or interstate commerce because of their limited nature and scope. Appellants offered no proof as to effect of the exemptions on either foreign or interstate commerce. However, if the Twenty-first Amendment means anything, it must give the States some ability to deal with liquor traffic over and above that otherwise permitted by other provisions of the Constitution. Proper disposition of this case requires a consideration of the interrelationship of the Twenty-first Amendment and the Import-Export Clause (Article I § 10, cl. 2) and the Commerce Clause (Article I § 8, cl. 3). These considerations in turn require a balancing of the State's interest in granting the exemptions in question with the effect such exemptions have on either foreign or interstate commerce. This can only be accomplished by proof which is absent

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[4]See *United States v. Jackson*, 390 U. S. 570 (1968) and cases cited therein; *Leitz v. Mealey*, 414 U. S. 33 (1941).

from this case. Under these circumstances, this Court should dismiss this case because the Appellants have failed to meet their burden of proof.

9. History of state legislation and the decisions of the Court in regard to the authority of the States to regulate and tax the liquor business dictates that the Court should give only a prospective application to any decision which would change existing state laws based on historical precedent of this Court under the Twenty-first Amendment. A prospective application of any rule under the circumstances of the present case, since the exemptions have expired, would not relate to any existing case or controversy.

For the reasons herein stated, and as more fully set forth in the Brief of the Appellee filed as of this date, it is respectfully submitted that this case should either be dismissed for lack of jurisdiction or remanded to the Court below for resolutions of issues which are relevant to its proper disposition.

Respectfully submitted,

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